MOHD KAMAL OMAR v. UNITED OVERSEAS BANK (MALAYSIA) BHD & OTHER APPEALS

FEDERAL COURT, PUTRAJAYA
ZULKEFLI AHMAD MAKINUDIN PCA
ZAINUN ALI FCJ
RAMLY ALI FCJ
AZAHAR MOHAMED FCJ
BALIA YUSOF WAHI FCJ
[CIVIL APPEALS NO: 03(f)-2-04-2017(W), 03(f)-3-01-2017(W) & 03(f)-4-01-2017(W)]
3 MAY 2018

BANKRUPTCY: *Notice – Setting aside – Judgment creditor obtained final judgment and commenced judgment debtor summons against judgment debtors – Whether judgment creditor entitled to commence bankruptcy proceeding – Making of order on judgment debtor summons pursuant to Debtors Act 1957 for satisfaction of original judgment by payment of instalments – Whether constitutes variation or modification of original judgment – Whether bankruptcy notice founded on original judgment invalidated – Whether bankruptcy notice a nullity*

The respondent as the judgment creditor ('JC') had obtained final judgment against the appellants as judgment debtors ('JD') for the sum of RM79,804,851.04. The JC then commenced a judgment debtors summons ('JDS') before the Senior Assistant Registrar ('SAR') and obtained an order against the JD ('JDS order'). The JD appealed against the JDS order. The High Court ordered that the JDS order ordering the JD to pay the sum of RM3,520,000 forthwith to the JC be set aside and ordered that the JDS order ordering the JD to pay the monthly instalment of RM5,000 to the JC until full settlement and costs of RM4,000 to the JC, remain unchanged. The JD complied with the JDS appeal order and made the required payments. The JC, however, alleged that the JD failed to comply with the monthly instalment due. The JC then filed bankruptcy notices ('BN') against the JD. The JD subsequently filed an application to set aside the BN and submitted, *inter alia,* that the JC could not commence a bankruptcy action as the JC had already obtained a JDS order against the JD and the JD had complied with the terms. The High Court dismissed the JD's application to set aside the bankruptcy notices and held that the JC could proceed to issue the BN for bankruptcy proceeding as under s. 3(1)(i) of the Bankruptcy Act 1967 ('BA'), a JC who has obtained a final order against a JD for any amount and execution thereon had not been stayed, was entitled to commence a bankruptcy proceeding. The JD appealed to the Court of Appeal against the decision of the High Court but the appeals were dismissed. Hence, these three appeals by the respective appellants. The Federal Court granted leave for the following question of law: whether the making of an order on a judgment debtor summons pursuant to the Debtors Act 1957 ('the Act') for the

satisfaction of an original judgment by payment of instalments, constitutes a variation or modification of the said original judgment, thereby barring the presentation of a bankruptcy notice founded on an original said judgment having regard to the decisions in *Montgomery & Co v. de Blumes* and *Re HA Pereira.*

Held (allowing appeals)
Per Zulkefli Ahmad Makinudin PCA delivering the judgment of the court:

(1) The instalment payment for the satisfaction of an original judgment made by the JD had resulted in a modification of the original judgment. Wherein the JC had agreed to allow the JD to pay by instalment towards the original judgment and the agreement entered under the JDS order had not been discharged, it would result in the JC being prevented from proceeding with the BN based on the original judgment. The original judgment had been varied or modified to the extent that the BN founded on the original judgment was thereby invalidated. The cases of *Re HA Pereira* and *Kuna Sockalingam Mudaliar* were cited primarily for the proposition that such orders on a JDS, modify or vary an original decree or judgment, such that it invalidates a BN founded on the original judgment. The principle laid down from these cases was still good law. (paras 9, 10 & 16)

(2) Under the JDS order, monthly instalment payment was to be made, but it did not fix a day in the month on or before which the sums were to be tendered. A tender of the sum at any time up to the end of that particular month was in compliance with that order. The JC, by filing the BN before the end of the last day of the month of March based on the whole of the original judgment debt and more particularly when there was no default clause, rendered the BN a nullity. (para 23)

(3) The JC was not entitled to commence any form of execution available to them, and for this matter, could not pursue different modes of execution concurrently. The judgment debtor summons under Part III of the Act is a special provision which allows the JC for recovery or payment of money by instalments or otherwise. The JC had to comply with the provisions provided for under the Act when the JC chose to proceed to enforce the final judgment obtained by the JDS. Section 8 of the Act is applicable only to proceedings in execution under the Act as provided for under s. 3 and under Part II of the same. The form of execution did not extend to bankruptcy proceedings. (paras 26 & 27)

(4) The question of law posed was answered in the affirmative. (para 28)

Bahasa Malaysia *Headnotes*

Responden sebagai pemiutang penghakiman ('JC') memperoleh penghakiman muktamad terhadap perayu-perayu sebagai penghutang penghakiman ('JD') untuk jumlah RM79,804,851.04. Pemiutang penghakiman kemudiannya memulakan satu saman penghutang penghakiman ('SPP') di hadapan Penolong Kanan Pendaftar ('PKP') dan memperoleh perintah terhadap JD ('perintah SPP'). Penghutang penghakiman merayu terhadap perintah SPP tersebut. Mahkamah Tinggi memutuskan perintah SPP yang memerintahkan JD membayar RM3,520,000 kepada JC diketepikan dan memutuskan perintah SPP yang memerintahkan JD membayar bayaran bulanan RM5,000 kepada JC sehingga penyelesaian penuh dan kos RM4,000, kekal tidak berubah. Penghutang penghakiman mematuhi perintah rayuan SPP dan membuat bayaran yang diperlukan. Pemiutang penghakiman, walau bagaimanapun, mendakwa JD gagal mematuhi pembayaran bulanan yang terhutang. Pemiutang penghakiman memfailkan notis kebankrapan ('NB') terhadap JD. Penghutang penghakiman seterusnya memfailkan permohonan mengetepikan NB dan menghujahkan, antara lain, bahawa JC tidak boleh memulakan tindakan kebankrapan kerana JC telah pun memperoleh perintah SPP terhadap JD dan JD telah mematuhi terma-termanya. Mahkamah Tinggi menolak permohonan JD untuk mengetepikan notis-notis kebankrapan dan memutuskan bahawa JC boleh terus mengeluarkan NB untuk prosiding kebankrapan kerana bawah s. 3(1)(i) Akta Kebankrapan 1967 ('AB'), JC yang telah memperoleh perintah muktamad terhadap JD untuk apa-apa jumlah dan pelaksanaannya belum digantung, berhak memulakan prosiding kebankrapan. Penghutang penghakiman merayu ke Mahkamah Rayuan terhadap keputusan Mahkamah Tinggi tetapi rayuan-rayuan itu ditolak. Oleh itu, ketiga-tiga rayuan ini oleh perayu-perayu. Mahkamah Persekutuan memberikan kebenaran untuk persoalan berikut: sama ada pembuatan satu perintah ke atas saman penghutang penghakiman menurut Akta Penghutang 1957 ('Akta') untuk memenuhi penghakiman asal melalui bayaran secara ansuran, membentuk variasi atau pengubahsuaian penghakiman asal tersebut, dengan itu menghalang penyampaian satu notis kebankrapan berdasarkan penghakiman asal tersebut mengambil kira keputusan-keputusan dalam *Montgomery & Co v. de Blumes* dan *Re HA Pereira*.

Diputuskan (membenarkan rayuan-rayuan)

Oleh Zulkefli Ahmad Makinudin PMR menyampaikan penghakiman mahkamah:

(1) Bayaran ansuran untuk memenuhi penghakiman asal yang dibuat oleh JD telah mengakibatkan pengubahsuaian penghakiman asal. Di mana JC bersetuju untuk membenarkan JD membayar dengan ansuran penghakiman asal dan persetujuan yang dimasuki bawah perintah SPP belum dilepaskan, akan mengakibatkan JC dilarang daripada meneruskan dengan NB berdasarkan penghakiman asal. Penghakiman asal telah pun divariasikan dan diubah suai sehingga NB berdasarkan

penghakiman asal dibatalkan. Kes-kes *Re HA Pereira* dan *Kuna Sockalingam Mudaliar* dipetik terutamanya untuk proposisi bahawa perintah-perintah sedemikan ke atas SPP, mengubah suai dan mengubah satu perintah atau penghakiman asal, dan membatalkan NB yang berasaskan penghakiman asal. Prinsip-prinsip dalam kes-kes ini masih undang-undang yang masih berkuatkuasa.

(2) Bawah perintah SPP, bayaran ansuran bulanan harus dibuat, tetapi ia tidak menetapkan tarikh dalam bulan tersebut, sama ada pada atau sebelum bayaran itu perlu dibayar. Pembayaran jumlah tersebut pada bila-bila masa sehingga akhir bulan tertentu mematuhi perintah itu. Pemfailan NB oleh JC sebelum penghujung hari terakhir bulan Mac berdasarkan keseluruhan penghutang penghakiman asal dan lebih-lebih lagi apabila tiada klausa keingkaran, menyebabkan NB batal.

(3) Pemiutang penghakiman tidak berhak memulakan apa-apa bentuk pelaksanaan yang sedia ada dan dalam hai ini, tidak boleh meneruskan cara pelaksanaan lain secara serentak. Saman penghutang penghakiman bawah Bahagian III Akta adalah peruntukan istimewa yang membenarkan JC mendapatkan semula atau memperoleh bayaran wang secara ansuran atau sebaliknya. Pemiutang penghakiman harus memenuhi peruntukan yang disediakan bawah Akta apabila JC memilih untuk terus menguatkuasakan penghakiman muktamad yang diperoleh melalui SPP. Seksyen 8 Akta hanya diguna pakai bagi prosiding dalam pelaksanaan bawah Akta seperti yang diperuntukkan bawah s. 3 dan bawah Bahagian II yang sama. Bentuk pelaksanaan tidak terlanjut pada prosiding kebankrapan.

(4) Soalan undang-undang dijawab secara afirmatif.

Case(s) referred to:

Ahna Lana Velathan v. Vina Chinniah And Sithambaram [1938] 1 LNS 8 HC ***(foll)***
Datuk Mohd Sari Datuk Hj Nuar v. Norwich Winterthur Insurance (M) Sdn Bhd [1992] 4 CLJ 1798; [1992] 1 CLJ (Rep) 68 SC ***(refd)***
In re HB [1904] 1 KB 94 ***(refd)***
Kuna Sockalingam Mudaliar v. Yang Saripah & Anor [1953] 1 LNS 39 HC ***(foll)***
Montgomery & Co v. De Blumes [1898] 2 QB 420 ***(refd)***
Moscow Narodny Bank Ltd v. Ngan Ching Wen [2004] 2 CLJ 241 FC ***(refd)***
Re Chen Sing Chew; Ex p Oriental Tin Smelters Sdn Bhd [1974] 1 LNS 204 ***(dist)***
Re HA Pereira Ex p Pagor Singh (Bhagat Singh) [1932] 1 LNS 64 ***(foll)***
Re Sturdee (a debtor) [1985] 2 NZLR 627 ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, ss. 3, 5(1), 8

For the appellant - Gopal Sri Ram, Wong Rhen Yen, Afdhilani Jusof, David Yii, Damien Chan, Bastian Pius Vendargon, Mohamed Fadzil Abdul Manan, Mohd Amran Mohd Aminuddin; M/s Hanif Idris & Assocs
For the respondent - Ng Sai Yeang & Loh Kah Hey; M/s Raja, Darryl & Loh

[Editor's note: For the Court of Appeal judgment, please see Azlin Azrai Lan Hawari v. United Overseas Bank (Malaysia) Bhd & Other Appeals [2017] 10 CLJ 18 (overruled). For the High Court judgment, please see Re: Sim Kok Beng; Exparte: United Overseas Bank (Malaysia) Bhd & Another Case [2016] 1 LNS 196 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Zulkefli Ahmad Makinudin PCA:

Introduction

[1] These are three appeals by the respective appellants against the decision of the Court of Appeal in dismissing their appeals against the decision of the High Court. The Federal Court had granted leave for the following question of law:

> Whether the making of an Order on a judgment debtor summons pursuant to the Debtors Act 1957 for the satisfaction of an original Judgment by payment of instalments, constitutes a variation or modification of the said original Judgment, thereby barring the presentation of a Bankruptcy Notice founded on an original said Judgment having regard to the decisions in *Montgomery & Co v. de Blumes* [1898] 2 QB 420 and *Re H.A. Pereira* [1932] MLJ 112?

Background Facts

[2] These three appeals by the respective appellants are related and arose from the same judgment of the High Court dated 11 August 2011. On 11 August 2011, the respondent as the judgment creditor (JC) had obtained final judgment against the appellants as judgment debtors (JD) for the sum of RM79,804,851.04. The JC then commenced a judgment debtors summons (JDS) before the Senior Assistant Registrar (SAR) and obtained an order against the JD on 3 November 2014 ("JDS order"). The JD appealed against the JDS order to the judge-in-chambers. On 9 December 2014, the learned High Court Judge allowed the appeal in part and ordered that:

(i) the JDS order ordering the JD to pay the sum of RM3,520,000 forthwith to the JC is set aside;

(ii) the JDS order ordering the JD to pay the monthly instalment of RM5,000 until full settlement and costs of RM4,000 to the JC, remain unchanged.

[3] In complying with the JDS appeal order, the JD made payments to the JC in the following manner:

(i) on 12 January 2015, the JD paid RM13,000 being payment for costs and monthly instalment payment for one month starting from 13 November 2014;

(ii) on 29 January 2015 the JD paid RM15,000 being the monthly instalment payment for three months starting from 13 December 2014; and

(iii) on 31 March 2015 the JD paid RM15,000 being the monthly instalment payment for three months starting from 13 March 2015.

[4] The JC alleged that the JD failed to comply with the monthly instalment due on 13 March 2015. The JC then filed bankruptcy notices ("BN") against the JD on 31 March 2015. The JD subsequently filed an application to set aside the BN *via* encl. 4 on 27 April 2015 on the following grounds:

(a) the JC cannot commence bankruptcy action as the JC had already obtained a JDS order against the JD. The JD has complied with the terms of the JDS order;

(b) the BN is contrary to law, null and void *ab initio* as the sum stated in the BN contradicts the amount awarded in the final judgment;

(c) the BN is void *ab initio* as the amount claimed is inaccurate and excessive.

Decision Of The High Court

[5] On 26 August 2015, the SAR dismissed the application (encl. 4) to set aside the bankruptcy notices. The JD appealed to the judge-in-chambers. On 28 January 2016, the High Court Judge dismissed the appeal. In dismissing the appeal, the learned judge of the High Court had this to say on the issue of whether the JC can commence bankruptcy action as the JC had already obtained a JDS order against the JD and the JD had complied with the terms of the JDS order:

> 24. ... the JC can proceed to issue the BN for bankruptcy proceeding as under s. 3(1)(i) of the Bankruptcy Act 1967 ("BA"), a judgment creditor who has obtained a final order against a judgment debtor for any amount and execution thereon had not been stayed, was entitled to commence a bankruptcy proceeding against the judgment.
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> 25. There is also the case of *Re Chen Sing Chew; Ex Parte: Oriental Tin Smelters Sdn Bhd* [1974] 1 LNS 204; [1974] 2 MLJ 69 which allows bankruptcy proceeding after the default of monthly payments for the debt, a fact similar to the present appeal ...
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> 27. The JD argues that the case *Re: HA Pereira ex parte Pagor Singh (Bhagat Singh)* [1932] 1 LNS 62; [1932] MLJ 112 does not allow for bankruptcy proceedings to be commenced in the event an agreement is reached that payments of the debt be allowed to be made by instalments.
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> 28. First that case law is too outdated, decided more than 80 years ago. More importantly the case *Re Chen Sing Chew* narrated earlier offered a different view, for which this court is more inclined to follow. Further *Re: HA Pereira* is not mindful of a situation where there is a default on the payment of instalments such as in the facts of the present appeal. I am therefore not persuaded to follow *Re: HA Pereira*.

29. Another case cited by the JD to argue the appeal is the case of *Datuk Mohd Sari Datuk Haji Nuar v. Norwich Winterthur Insurance (M) Sdn Bhd* [1992] 1 CLJ Rep 68; [1992] 2 MLJ 344 …

30. The above case is distinguishable on its facts as there was the finding that a bankruptcy proceeding was not provided for on default of the payments by instalments as "agreed". The present appeal is different as the BN was issued based on the JDS order that has already been issued. It is pursued because of the non-compliance of the payments on the JDS order. Therefore this court is not minded to follow *Datuk Mohd Sari.*

Decision Of The Court Of Appeal

[6] The JD appealed to the Court of Appeal against the decision of the High Court. The appeals were dismissed. On whether the JC can commence bankruptcy proceedings as the JDS was already in place against the JD, the Court of Appeal *inter alia* stated as follows:

36. ... since execution is not prevented nor stayed with the issuance of the JDS Order, then the JC has met the requirements for the committal of an act of bankruptcy under section 3(1)(i) of the Bankruptcy Act 1967 namely, the Judgment is a final one, the JD had failed to comply with the BN and more pertinently, the execution of the Judgment is not stayed.

37. Since the JD has committed an act of bankruptcy, therefore, it follows that the BN is valid and there are no merits in the application by the JD to set aside the BN.

38. As section 8 of the Debtors Act 1957 provides that an order for the payment of installment payments shall not be a bar to proceedings in execution save and except to the extent that the court shall so direct, it is to be noted that, when the Court granted the JDS order, there was no direction from the Court as to the extent of any permissible execution proceedings pursuant to this said section, i.e. there was no limitation nor conditions set out on execution in the JDS Order.

Decision Of This Court

[7] In the present case, there was a final judgment entered against the JD. The JC invoked the court's jurisdiction pursuant to the Debtors Act 1957 ("the Act") by commencing JDS proceedings against the JD.

[8] The JC successfully obtained an order of the court directing the JD to make certain payments, which included payments on the original judgment debt by instalments till satisfaction. The JD paid those instalment sums up to 31 March 2015. On 31 March 2015 the JC filed the BN against the JD founded on the original judgment (the final judgment). The question raised before this court now is whether the order for instalment payments under the JDS proceedings constitutes a variation or modification of the original judgment.

[9] It is our considered view that the instalment payment for the satisfaction of an original judgment made by the JD had resulted in a modification of the original judgment. It follows that the BN which is founded on the original judgment is thereby invalidated. On this point, we

would refer to the case of *Montgomery & Co v. De Blumes* [1898] 2 QB 420 where Chitty, LJ, in assessing the principles of payment by instalment of an original judgment debt held, *inter alia*, that such JDS order (there a county court order) as long as it stands, constitutes a modification of the order of the High Court as in our present case. At pp. 422-423 of the judgment Chitty LJ had this to say:

> The question is whether, in point of law, the plaintiff, who have voluntarily gone to the County Court Judge and put in motion s. 5 of the Debtors Act 1869 can afterwards levy execution on the judgment in the High Court without going to the County Court Judge and getting the order made by him discharged. I think that the Act means that if a party goes to the County Court and accepts an order from the Judge there for payment by instalments he thereby elects to have the judgment of the High Court modified to the extent of that order.

In the English Court of Appeal case of *In re H.B.* [1904] 1 KB 94, it was held that an agreement to settle the judgment debt by instalments results in a modification of the original judgment.

[10] It is our judgment in the circumstances of this case, wherein the JC had agreed to allow the JD to pay by instalment towards the original judgment and the agreement entered under the JDS order had not been discharged it would result in the JC being prevented from proceeding with the BN based on the original judgment. The original judgment had been varied or modified to the extent that the BN founded on the original judgment is thereby invalidated.

[11] In the local case of *Re H.A. Pereira Ex Parte Pagor Singh (Bhagat Singh)* [1932] 1 LNS 64; [1932] MLJ 112, Mudie, J accepted and applied the principle laid down in *Montgomery & Co v. De Blumes* that so long as an order is made for the payment on an original sum by instalment, and is in force that constitutes a modification of the original judgment or order and consequently the BN which is founded on the original judgment is thereby invalidated.

[12] In the case of *Datuk Mohd Sari Datuk Haji Nuar v. Norwich Winterthur Insurance (M) Sdn Bhd* [1992] 4 CLJ 1798; [1992] 1 CLJ (Rep) 68; [1992] 2 MLJ 344, the Supreme Court approved of the principle in the case of *Re H.A. Pereira* that the judgment was modified by the order to pay by instalments and as such a BN founded on the judgment as it originally stood was invalidated. This case also approved the principle enunciated by Vaughn Williams LJ in *Re H.B.* (*supra*).

[13] In the case of *Ahna Lana Velathan v. Vina Chinniah And Sithambaram* [1938] 1 LNS 8; [1939] MLJ 34, the court held that the JDS order to pay by instalments was a variation of the original decree (judgment).

[14] In the case of *Kuna Sockalingam Mudaliar v. Yang Saripah & Anor* [1953] 1 LNS 39; [1954] MLJ 11 the Court of Appeal held that the order to pay by instalments on a judgment constituted a variation of the decree (judgment). It was also held that the order made was not a mode of execution.

[15] It is the contention of the JC that so long as the original judgment is valid and there is no stay of execution, the JC is entitled to commence any form of execution available to them and also for that matter can pursue different mode of execution concurrently. Learned counsel for the JC further submitted that the authority of *Re H.A. Pereira* cited in support of the JD's case is of no relevance and should not be applied as it does not represent present laws. Section 8 of the Act was referred to wherein it states that execution of a judgment is not barred notwithstanding the JDS order.

[16] With respect, we do not agree with the contention of the JC that the cases of *Re H.A. Pereira*, *Ahna Lana Velathan* and *Kuna Sockalingam Mudaliar* are of no relevance. These cases were cited primarily for the proposition that such orders on a JDS, modify or vary an original decree or judgment, such that it invalidates a BN founded on the original judgment. We are of the view, the principle laid down from these cases is still good law, and have withstood the test of time. They have not been overruled or disapproved by our superior courts prior to the Court of Appeal decision in this case.

[17] It is to be noted that the case of *Re H.A. Pereira* had been cited with approval by the Supreme Court in the case of *Datuk Mohd Sari*. Although the facts in *Datuk Mohd Sari* are different as observed by the Court of Appeal, the principle of law for citing this case still holds good. In *Datuk Mohd Sari* the Supreme Court applied the principle that an agreement to pay by instalment would result in modifying an original judgment.

[18] The Court of Appeal in the present case had considered and accepted the case of *Re Chen Sing Chew; Ex p Oriental Tin Smelters Sdn Bhd* [1974] 1 LNS 204 as the authority for the proposition that the earlier order of directing payment by instalment did not invalidate the bankruptcy proceedings. It is noted that the Court of Appeal had erred in referring to *Re Chen Sing Chew* as a decision of the Supreme Court presumably accepting it as a binding precedent under the doctrine of *stare decisis.*

[19] The case of *Re Chen Sing Chew* was a High Court decision in the exercise of its original civil jurisdiction made without reference to a single precedent or authority. We are of the view the decision made was *per incuriam* and on the point in issue, *obiter dicta.*

[20] It is our judgment that *Re Chen Sing Chew* cannot be relied upon as an authority for the proposition that bankruptcy proceedings have not been rendered invalid by the orders for payment of the judgment debt by instalments. We take the view that the case of *Re H.A. Pereira* following the principle laid down in *Montgomery* is still good law.

[21] We noted in the judgment of the Court of Appeal it stated that the acceptance of monthly instalment payments under the JDS did not nullify the BN. The Court of Appeal further considered the provision of s. 5(1) of the Bankruptcy Act 1967 and cited the case of *Moscow Narodny Bank Ltd v. Ngan Ching Wen* [2004] 2 CLJ 241; [2005] 3 MLJ 693 to hold that even if the amount claimed in the BN is excessive, the bankruptcy proceedings are not invalidated so long as the amount exceeds the statutory minimum sum of RM30,000 under s. 5(1) of the Bankruptcy Act 1967. With respect, we find that such a contention by the JC is not the issue in the present case. The issue here is whether in the light of the JDS order, the original judgment stood modified or varied, such that a BN founded on the original judgment was a nullity.

[22] On the issue of whether the JD had been in breach of the JDS order, the Court of Appeal in the present case found that the JD had defaulted in the monthly instalment payment. Relying on the case of *Re Chen Sing Chew* the Court of Appeal held that default of instalment payments was a breach of an order to pay by instalments and it followed that the bankruptcy proceedings had not been rendered invalid. With respect, we find that the Court of Appeal failed to note the distinguishing feature between the present case and *Re Chen Sing Chew*. In *Re Chen Sing Chew* there was a default clause in place in the JDS order, whereas in the present case there is none.

[23] In the present case, we also found that the Court of Appeal failed to note that under the JDS order, monthly instalment payment is to be made, but it does not fix a day in the month on or before which the sums are to be tendered. A tender of the sum at any time up to the end of that particular month is in compliance with that order. On this point, we are of the view the JC by filing the BN before the end of the last day of March based on the whole of the original judgment debt and more particularly when there is no default clause, renders the BN a nullity.

[24] We also noted that the Court of Appeal considered the point as to whether a JDS order constitutes an implied stay of execution. Relying on the New Zealand High Court case of *Re Sturdee (a debtor)* [1985] 2 NZLR 627, it was held that a JDS order does not constitute an implied stay of execution. With respect, we find that the Court of Appeal was in error on this point. It is not the JD's argument that the JDS order constitutes an implied stay of execution but it is whether the making of an order on a JDS for the satisfaction of an original judgment by payment of instalments constitutes a variation or modification of the judgment thereby barring the presentation of a bankruptcy notice founded on the original said judgment.

[25] It is also to be noted that in *Re Sturdee,* there was no JDS order in place and what was in place was the issuance of a judgment debtor summons. This is the distinguishing feature from the present case where a JDS order was in place and payments were being made according to its terms.

[26] As regards the contention of the JC that the JC is entitled to commence any form of execution available to them and for this matter can pursue different mode of execution concurrently, with respect, we could not agree with such a contention. The judgment debtor summons under Part III of the Act is a special provision which allows the JC for recovery or payment of money by instalments or otherwise. The fact that the JC had chosen to proceed to enforce the final judgment obtained by JDS, the JC has to comply with the provisions provided for under the Act.

[27] Learned counsel for the JC also referred to us the provision of s. 8 of the Act to support his contention that an order for the payment of instalments of a judgment debt shall not be a bar to proceedings in execution unless and except to the extent that the court shall direct. With respect, again we could not agree with such a contention. It is our considered view that s. 8 of the Act is applicable only to proceedings in execution under the Act as provided for under s. 3 and under Part II of the same. The form of execution therefore does not extend to bankruptcy proceedings as taken up by the JC in the present case.

Conclusion

[28] For the reasons above-stated, we would allow these appeals with costs. The question of law posed is answered in the affirmative. In the result, we make an order in terms of the appellant's (JD's) application of encl. (4) to set aside the BN.